U.S. Department of Labor

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Issue Date: 20 April 2006

CASE NO.: 2005-BLA-05649

In the Matter of

JAMES H. CALVERT
Claimant

v.

CALVERT & YOUNGBLOOD COAL CO.
Employer

and

CAPITAL FIRE & MARINE INSURANCE CORP.
c/o OLD REPUBLIC INSURANCE CO.
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest

Appearances:

Patrick K. Nakamura, Esquire
For Claimant

James M. Kennedy, Esquire
For Employer

Before:

Janice K. Bullard
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from a claim for benefits under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 901-945 ("the Act") and the regulations issued thereunder,

which are found in title 20 of the Code of Federal Regulations ("CFR"). Regulations referred to herein are contained in that Title.

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a dust disease of the lungs resulting from coal dust inhalation.

This decision is based upon consideration of the record and the arguments of the parties.[1]

I. ISSUES

(1) whether Claimant has pneumoconiosis;

(2) whether Claimant's pneumoconiosis arose out of coal mine employment;

(3) whether Claimant is totally disabled;

(4) whether Claimant's disability is due to pneumoconiosis; and

(5) whether there has been a change in any applicable element of entitlement upon which the order denying the previous claim became final.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural Background

James H. Calvert, (hereinafter referred to as "Claimant") filed an initial claim for benefits under the Act on June 30, 1982. The claim was denied by the Director, Office of Workers' Compensation Programs for the U.S. Department of Labor ("the Director" hereinafter) on October 25, 1982. No further action on that claim was taken. DX 1.

On June 9, 2004, Claimant filed a second claim for compensation under the Act, which is currently before me. DX 3. The Director named Calvert and Youngblood Coal Company ("Employer" hereinafter) as the operator responsible for compensation of the claim. DX 12. On February 18, 2005, the Director issued its determination that Claimant is not entitled to benefits under the Act. DX 22. Claimant disagreed with that determination and requested a formal hearing before the Office of Administrative Law Judges ("OALJ"). DX 23. The case was referred to the OALJ for a formal hearing, and was subsequently assigned to me.

I held a formal hearing in Birmingham, Alabama on October 26, 2005, at which time the parties had full opportunity to present evidence and argument. DX 1 through DX 28 were admitted into evidence. Also admitted to the record were Employer's exhibits EX 1 through 11

[1] The following references appear throughout this Decision and Order: "DX" refers to Director's exhibits; "CX" refers to Claimant's exhibits, "EX" refers to Employer's exhibits and "Tr." refers to transcript of the October 26, 2005 hearing.

and Claimant's Exhibit 1 through 5.[2] It was noted, however, that Employer's Exhibits 2, 3, and 5 would be submitted post-hearing. Subsequent to the hearing, Employer submitted the transcript of the deposition of Dr. A. Goldstein which had been designated as Employer's Exhibit 3. Employer has not submitted the addendum reports by Drs. Goldstein and Rosenberg for which Employer's Exhibit 2 and 5 were reserved. On January 20, 2006 and January 23, 2006, Claimant and Employer respectively filed briefs.

The regulations controlling the determination of a claim for benefits under title IV of the Act were amended in 2000, effective January 19, 2001. The revised regulations apply to all claims filed and all benefit payments made after January 19, 2001. 20 C.F.R. § 725.2(c) (2000). As the instant claim was filed after the effective date of the revised regulations, the limitations on evidence set forth at 20 C.F.R. § 725.414 apply. Medical evidence that exceeds the limitations of § 725.414 "shall not be admitted into the hearing record in the absence of good cause." § 725.456(b)(1). The fact that the evidence is relevant does not alone constitute "good cause." The parties may not agree to the admission of excessive medical evidence. Smith v. Martin County Coal Corporation, BRB No. 04-0126 BLA (Oct. 27, 2004), (to be published at 23 BLR 1-). *See also* Phillips v. Westmoreland Coal Co., BRB No. 04-0379 BLA (Jan. 27, 2005, unpub.).

B. Factual Background

Claimant was born on January 8, 1923. DX 1, 3, 19. He was married to his wife Mova Jean Frances Carson Calvert, who is deceased. DX 1, 3. Claimant spent his working life in coal mining, and last worked as a miner in 1981. Id. His last employer was Calvert & Youngblood Coal Company. He retired in 1981 when the mines shut down while he was out on sick leave for a broken arm. DX 19. Claimant's work was performed in strip mine operations above ground. His last job was as a loader operator, which involved loading rock onto trucks. Tr. 27.

Claimant has been diagnosed with arthritis, and he has undergone surgery for two knee replacements and cataracts. He also has sleep apnea. DX 19. In addition, Claimant testified that he takes blood thinners and cholesterol medication since a stroke that he suffered three months before the hearing. Tr. 33. Claimant stated that his breathing prevents him from walking to his mailbox and keeping a garden. Tr. 31. Claimant also has tried to use a special mask while he sleeps to treat his sleep apnea, but he could not tolerate the device. DX 19. Claimant currently uses an inhaler. Tr. 32-33. Claimant is not smoking at the present, but he smoked about 1/2 pack a day from the age of 19 or 20 until he quit 25 years ago. Tr. 34-37.

C. Coal Mine Employment and Responsible Operator

The District Director determined that Claimant established 29 1/4 years of coal mine employment. Employer stipulated to 29 1/4 years of coal mine employment, to which Claimant also agreed. Tr. at 17-19. Claimant's Social Security Administration Earnings Statement supports this stipulation. DX 7. Accordingly, I find that Claimant has established 29 1/4 years

[2] Because the evidence is limited by regulation, this Decision and Order relies only upon that evidence that does not exceed the limitations.

of coal mine employment. Employer further conceded that it is the responsible operator and Employer who withdrew all issues except for the medical issues. Tr. 20.

D. Entitlement

Because this claim was filed after the enactment of the Part 718 regulations, Claimant's entitlement to benefits will be evaluated under Part 718 standards. In order to establish entitlement to benefits under Part 718, Claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) the miner suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) the miner is totally disabled, and (4) the miner's total disability is caused by pneumoconiosis. Director, OWCP v. Greenwich Colliers, 512 U.S. 267 (1994).

In addition, this claim represents a subsequent claim, which requires analysis under the standard set forth in the revised regulations at 20 C.F.R. § 725.309(d). That regulation states that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. The applicable conditions of entitlement are those upon which the prior denial was based.

In order to determine whether a condition has changed, I must consider all of the new evidence, favorable and unfavorable, and determine whether the Claimant has proven at least one of the elements previously adjudicated against him. If the miner establishes the existence of one of the applicable elements of entitlement, then his claim would not be denied on the basis of the prior denial pursuant to Section 725.309(d). I would then consider whether all of the record evidence supports a finding of entitlement to benefits.

The Claimant's first application was denied because the evidence failed to establish that Claimant had pneumoconiosis that arose out of coal mine employment or that he was totally disabled by pneumoconiosis.

1. Presence of Pneumoconiosis

Section 718.201(a) defines pneumoconiosis as a "chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment" and "includes both medical, or 'clinical,' pneumoconiosis and statutory, or 'legal,' pneumoconiosis." Section 718.201(a)(1) and (2) defines clinical pneumoconiosis and legal pneumoconiosis. Section 718.201(b) states:

> [A] disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

There are four means of establishing the existence of pneumoconiosis, set forth at § 718.202(a)(1) through (a)(4).

(1) x-ray evidence § 718.202(a)

(2) biopsy or autopsy evidence § 718.202(a)(2)

(3) regulatory presumptions § 718.202(a)(3)

a) § 718.304 - Irrebuttable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis.

b) § 718.305 - Where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment.

c) § 718.306 - Rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978 and was employed in one of more coal mines prior to June 30, 1971.

(4) Physicians' opinion based upon objective medical evidence §718.202(a)(4).

a. Chest X-Ray Evidence

Under § 718.202(a)(1), the existence of pneumoconiosis can be established by chest x-rays conducted and classified in accordance with § 718.102.[3] The current record contains chest x-ray evidence admitted as follows:

Date of X-ray	Date Read	Exhibit No.	Physician	Radiological Credentials	I.L.O. Classification
08/20/04	08/20/04	DX 9	Ballard	BCR; B	1/0 q, q
08/20/04	10/18/04	DX 9	Barrett	BCR; B	Quality reading only – quality 2
08/20/04	08/19/05	EX 8	Wheeler	BCR; B	0/1, q, q, changes not pneumoconiosis, since without small nodular infiltrates in central mid and upper lungs

[3] A B-reader ("B") is a physician who has demonstrated a proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. § 37.51. A physician who is a Board certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. § 727.206(b)(2)(iii) (2001).

08/20/04	10/10/05	CX 4	Miller	BCR; B	2/1 r, q
11/30/04	11/30/04	EX 1	Goldstein	B	0/1 q, q
11/30/04	08/26/05	EX 7	Wheeler	BCR; B	No pneumoconiosis
11/30/04	09/16/05	CX 1	Cappiello	BCR; B	1/0 p, q
11/30/04	09/21/05	CX 2	Miller	BCR; B	1/2 r, q

It is well established that the interpretation of an x-ray by a B- reader may be given additional weight by the fact-finder. Aimone v. Morrison Knudson Co., 8 B.L.R. 1-32, 1-34 (1985); Martin v. Director, OWCP, 6 B.L.R. 1-535, 1-537 (1983). The Benefits Review Board has also held that the interpretation of an x-ray by a physician who is a B-reader as well as a Board-certified radiologist may be given more weight than that of a physician who is only a B-reader. Scheckler v. Clinchfield Coal Co., 7 B.L.R. 1-128, 1-131 (1984). In addition, a judge is not required to accord greater weight to the most recent x-ray evidence of record, but rather, the length of time between the x-ray studies and the qualifications of the interpreting physicians are factors to be considered. McMath v. Director, OWCP, 12 B.L.R. 1-6 (1998); Pruitt v. Director, OWCP, 7 B.L.R. 1-544 (1984); Gleza v. Ohio Mining Co., 2 B.L.R. 1-436 (1979).

The film taken on August 20, 2004 was interpreted as positive for pneumoconiosis by Drs. Ballard and Miller, both of whom are board certified in Radiology and B readers. Dr. Wheeler, who is also both board certified in radiology and a B-reader, interpreted the film as negative for the disease. Dr. Barrett, who is board certified in radiology and a B-reader read the film for quality only.

The November 30, 2004 x-ray film was interpreted as positive by Drs. Miller and Cappiello, both dually qualified physicians. The film was interpreted as negative by Dr. Goldstein, who is a B-reader, and negative by Dr. Wheeler who is dually qualified.

Thus, the record includes both positive and negative readings of the two x-ray films by physicians with equally high qualifications. Based on these equally credible readings by highly qualified physicians whose opinions are in opposition, I find that the x-ray evidence is evenly balanced. Under such circumstances, when the evidence is evenly balanced, the benefits claimant must lose since he bears the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 11 S.Ct. 2251 (1994). Based on the foregoing, I find that the x-ray evidence fails to establish the presence of pneumoconiosis.

b. Biopsy or autopsy evidence, § 718.202(a)(2)

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. § 718.202(a)(2). A determination that pneumoconiosis is present may be based on a biopsy or autopsy. § 718.202(a)(2). That method is unavailable here because the current record contains no such evidence.

c. Regulatory Presumptions, § 718.202(a)(3)

A determination of the existence of pneumoconiosis may also be made by using the presumptions described in §§ 718.304, 718.305 and 718.306. Section 718.304 requires x-ray, biopsy or equivalent evidence of complicated pneumoconiosis, which is not present in this case. Section 718.305 is not applicable because this claim was filed after January 1, 1982. Section 718.306 is only applicable in the case of a deceased miner who died before March 1, 1978. Since none of these presumptions is applicable, the existence of pneumoconiosis has not been established under § 718.202(a)(3).

d. Physicians' Opinions, § 718.202(a)(4)

The fourth way to establish the existence of pneumoconiosis under § 718.202 is through physician opinions:

> A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

The record contains the following physicians' opinions:

J. Hawkins, M.D. (DX 9, CX 3)

Dr. Hawkins is certified in internal medicine and pulmonary disease. He examined the Claimant on August 20, 2004, and reviewed a job history of 35 years of coal mine employment in strip mine operations. The doctor noted Claimant's history of a disability determination due to arthritis in 1982 and pneumonia in 1998. Claimant had knee replacement surgeries in 1997 and 1998. In addition, Dr. Hawkins noted Claimant's history of cataract surgery in 1994. Although Claimant reported that he was not smoking, Dr. Hawkins observed that he smoked earlier in his life, beginning in 1962 at the age of 20. Claimant's reported attacks of sputum, dyspnea, cough and orthopnea were noted. Claimant's height was noted as 72". Dr. Hawkins documented that his examination of Claimant's lungs showed that they were symmetrical on inspection, with no tenderness on palpation and no dullness to percussion. Faint basilar crackles were obvious on auscultation. Claimant's other systems were within normal limits or showed no abnormality. Dr. Hawkins also performed pulmonary testing, including a chest x-ray which showed abnormal parenchymal changes consistent with pneumoconiosis. A pulmonary function study showed a mild airflow obstruction and blood gas studies demonstrated adequate resting and exertional gas exchange. Dr. Hawkins diagnosed pneumoconiosis based on Claimant's symptoms, the abnormal chest x-ray, and Claimant's high level of dust exposure. Dr. Hawkins also diagnosed chronic bronchitis based upon Claimant's history of cough, exertional dyspnea and spirometry.

Dr. Hawkins observed that the spirometry showed an illegible finding, from which he diagnosed bronchitis. Dr. Hawkins stated Claimant has a mild to moderate respiratory impairment based on the presence of exertional dyspnea. The doctor concluded that Claimant could not perform manual labor and should avoid further exposure to chemicals, dust and fumes. In an additional statement dated October 3, 2005, Dr. Hawkins reiterated his finding that the chest x-ray film was compatible with pneumoconiosis, the pulmonary function study demonstrated an airflow obstruction and reduced ventilatory capacity. Based on these findings and Claimant's chronic coughing with exertional dyspnea, Dr. Hawkins opined that Claimant is unable to perform his last coal mine employment of operating a loader.

M. Vuskovich, M.D. (EX 6)

Dr. Vuskovich, is certified in internal medicine and occupational medicine. He reviewed the pulmonary function study of August 20, 2004 and found that it was valid and demonstrated normal values. Dr. Vuskovich stated further that this test showed Claimant's "bellows" and "conduit" functions are intact. Dr. Vuskovich also reviewed the blood gas study of August 20, 2004 and found that it showed Claimant's end-organ functions are intact and the exercise results showed no diffusion capacity abnormality. Dr. Vuskovich concluded that the valid spirometry and post-exercise blood gas study results showed that Claimant had the pulmonary capacity to do his usual coal mine employment on August 20, 2004, even if simple pneumoconiosis is present.

Dr. A. Goldstein, M.D. (EX 1, EX 3)

Dr. Goldstein, a board certified internist and pulmonary specialist, examined Claimant on November 30, 2004. Dr. Goldstein reviewed a job history of 35 years of coal mine employment in strip mine operations. The doctor noted Claimant's history of hospitalizations for bilateral knee surgery, bilateral cataract surgery and sleep apnea. Dr. Goldstein documented Claimant's reported smoking history of 19 years ending in 1962. Claimant also reported experiencing attacks of shortness of breath for more than 20 years and a usually non-productive cough for 2 to 3 years. Claimant also has had some wheezing for an undetermined amount of time. On physical examination, Dr. Goldstein found that Claimant's lungs were clear to auscultation and percussion with breath sounds slightly diminished. Dr. Goldstein also performed pulmonary testing, including a chest x-ray that showed some nodularity that could be coal workers' pneumoconiosis or could be blood vessels on end. On pulmonary function study, Dr. Goldstein reported normal results that were better than those Claimant demonstrated in August, 2004. A blood gas study showed normal resting results, but exercise was stopped because of premature heart beats. Dr. Goldstein reported, however, that after the limited exercise, Claimant's oxygen levels did increase appropriately. Dr. Goldstein also reviewed Dr. Hawkins' examination report. Dr. Goldstein concluded that Claimant has chest x-ray findings which suggest pneumoconiosis of a minimal degree. The doctor concluded however, that Claimant has no impairment due to pneumoconiosis based on the normal pulmonary function on testing and appropriate oxygen response to exercise. Since Claimant has no disabling pulmonary impairment, Dr. Goldstein stated coal mine dust exposure is not the cause of any disability, though he is limited by his arthritis.

On October 25, 2005, Dr. Goldstein testified by deposition and reiterated many of his written findings. He noted that Claimant's improvement on pulmonary function study tests from August to November, 2004 is not consistent with pneumoconiosis, which the doctor said causes a fixed disability. Dr. Goldstein stated that the test results are consistent with a reversible obstruction. Dr. Goldstein also reviewed the pulmonary function study results from Dr. Vines taken on September 30, 2005 and stated that the results were not valid because the curves were not smooth on the flow volume loop.

Dr. D. Rosenberg, M.D. (EX 4)

Dr. D. Rosenberg, a board certified internist and pulmonary specialist, reviewed the examination reports of Drs. Goldstein and Hawkins on August 29, 2005. Dr. Rosenberg Claimant's 29 years in coal mine employment, minimal smoking history, disability due to arthritis and history of sleep apnea. Dr. Rosenberg stated that Claimant's pulmonary function studies in 2004 were normal with normal gas exchange demonstrated. Dr. Rosenberg also noted the chest x-ray reading by Dr. Goldstein of pneumoconiosis, 0/1. Since the total lung capacity and FVC values were normal, Dr. Rosenberg stated Claimant has no restrictive impairment. The diffusing capacity values when corrected for lung volumes were also normal, which the doctor found demonstrated that Claimant's alveolar capillary beds within his lungs are intact. Dr. Rosenberg stated that exercise blood gas study values are the best indicia of the intactness of the lung interstitium and the absence of scarring. The doctor cited medical authorities in support of that opinion. Dr. Rosenberg observed no rales on auscultation on physical examination and noted no definite micronodularity on the chest x-ray read by Dr. Goldstein. Thus, Dr. Rosenberg stated there is no evidence that Claimant has clinical coal workers' pneumoconiosis.

From a functional perspective, Dr. Rosenberg stated that Claimant has no obstruction or restriction, and had a normal diffusing capacity value and normal gas exchange. From a pulmonary perspective, therefore, Dr. Rosenberg stated Claimant could do his usual coal mine employment. Dr. Rosenberg also cited medical literature regarding the results of pulmonary function studies that indicate that Claimant's values do not establish the presence of chronic obstructive pulmonary disease. Dr. Rosenberg concluded Claimant has no medical or legal coal workers' pneumoconiosis and no pulmonary impairment. Dr. Rosenberg stated, therefore, Claimant is capable of doing arduous labor.

T. Alan Vines, M.D. (CX 5)

In a report of September 30, 2005, Dr. Vines wrote that Claimant was referred to him by Dr. Schmitt for evaluation of shortness of breath. Dr. Vines stated he saw Claimant last in January, 2005. Dr. Vines diagnosed Claimant with asthma for which he used a metered dose inhaler. In addition, the doctor noted that Claimant has sleep apnea, but Claimant does not use the CPAP mask at night. Claimant also has restless leg syndrome and gastroesophageal reflux disease, both of which are treated with medication. Dr. Vines also noted that Claimant has a history of occupational lung disease with an exposure to coal mine dust and asbestos. Dr. Vines found Claimant's lungs were clear on physical examination. On laboratory testing, Dr. Vines reported oxygen saturation value and results from pulmonary function study. Dr. Vines observed that a chest x-ray showed a few small granulomas, unchanged since previous x-ray. Dr. Vines'

impression included: 1) asthma with increasing symptoms, off therapy, new medication prescribed; 2) allergic rhinitis; 3) obstructive sleep apnea; 4) restless leg syndrome, stable; 5) periodic limb movements of sleep, stable; 6) gastroesophageal reflux disease, stable; 7) occupational lung disease, currently undergoing evaluation; and 8) CVA.

Discussion

A medical opinion is well-documented if it provides the clinical findings, observations, facts and other data the physician relied on to make a diagnosis. Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987). An opinion that is based on a physical examination, symptoms and a patient's work and social histories may be found to be adequately documented. Hoffman v. B & G Construction Co., 8 B.L.R. 1-65 (1985). A medical opinion is reasoned if the underlying documentation and data are adequate to support the findings of the physician. Fields, *supra.* A medical opinion that is unreasoned or undocumented may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149 (1989).

On consideration of the medical opinion reports, I note that Dr. Vines did not specifically diagnose pneumoconiosis, but stated instead that Claimant's occupational lung disease was currently undergoing evaluation. Dr. Hawkins did diagnose pneumoconiosis based on the chest x-ray, coal mine employment history and symptoms of dyspnea. Dr. Goldstein stated that the chest x-ray findings suggested a minimal degree of pneumoconiosis. Dr. Goldstein read the x-ray film as showing pneumoconiosis, 0/1. Dr. Rosenberg stated on review of the two examination reports that Claimant does not have medical or legal pneumoconiosis. Dr. Rosenberg noted in particular, an x-ray of Dr. Goldstein that showed no definite evidence of micronodularity. Drs. Hawkins and Goldstein discussed the presence or absence of pneumoconiosis from the perspective of the findings on chest x-ray. Dr. Rosenberg, however, supports his conclusion that pneumoconiosis is not present with additional discussion of the results on pulmonary function study and blood gas study which he concluded support a finding that Claimant's lungs are "intact" and that there is no scarring present. Thus, I find Dr. Rosenberg's opinion on the presence or absence of pneumoconiosis better supported since he discusses the medical evidence more completely in support of his finding of no medical or legal pneumoconiosis. I accord greater weight to Dr. Rosenberg's opinions and find that they are better reasoned and documented than those of Dr. Hawkins and Dr. Goldstein. Based on Dr. Rosenberg's better supported opinion, therefore, I find Claimant has not established the presence of pneumoconiosis under the provisions of subsection 718.202(a)(4).

e. Other Evidence

Records of a miner's hospitalization or medical treatment for a respiratory or pulmonary or related disease may be received into evidence. § 725.414(a)(4). The record, however, does not contain any such evidence. Dr. Vines' report, discussed above, does not include any medical treatment notes.

f. Totality of Evidence

Considering all of the evidence together, I find that it does not establish that Claimant has pneumoconiosis. The medical opinion evidence that Claimant does not have pneumoconiosis, specifically the medical review report of Dr. Rosenberg, is well supported by the chest x-ray readings upon which he relies as well as the results of pulmonary testing which he discusses in detail. I find this medical opinion evidence is not contradicted by the equally balanced x-ray reports or the medical opinion reports which are based primarily on the chest x-ray readings. Thus, I find that Claimant has not met his burden of proof on the issue of the presence of pneumoconiosis.

2. Pneumoconiosis arising out of coal mine employment

Based upon Claimant's coal mine employment history of at least 35 years, he is entitled to a rebuttable presumption that pneumoconiosis arose out of his coal mine employment. §.203 (b). However, because Claimant has not established that he has pneumoconiosis, he is not entitled to this presumption, and cannot meet his burden with respect to this element of entitlement.

3. Total disability

In order for Claimant to prevail, he must establish that he is totally disabled due to a respiratory or pulmonary condition. Total disability is defined in § 718.204(b)(1) as follows:

> A miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone prevents or prevented the miner (i) [f]rom performing his or her usual coal mine work; and (ii) [f]rom engaging in [other] gainful employment in a mine or mines.

§ 718.204(b)(1). Non-pulmonary and non-respiratory conditions, which cause an "independent disability unrelated to the miner's pulmonary or respiratory disability" have no bearing on total disability under the Act. § 718.204(a). Additionally, § 718.204(a) provides that:

> If, however, a non-pulmonary or non-respiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition shall be considered in determining whether the miner is or was totally disabled [under the Act].

Claimant may establish total disability in one of four ways: pulmonary function study; arterial blood gas study; evidence of cor pulmonale with right-sided congestive heart failure; or reasoned medical opinion. 20 C.F.R. section 718.204(c)(1)-(4).

a. Pulmonary function test evidence

In order to establish total disability through pulmonary function tests, the FEV_1 must be equal to or less than the values listed in Table B1 of Appendix B to this part and, in addition, the tests must also reveal either: (1) values equal to or less than those listed in Table B3 for the FVC test, or (2) values equal to or less than those listed in Table B5 for the MVV test or, (3) a percentage of 55 or less when the results of the FEV_1 test are divided by the results of the FVC tests. 20 C.F.R. section 718.204(c)(1)(i)-(iii).

In addition, the assessment of pulmonary function study results are dependent on Claimant's height. Protopappas v. Director, 6 B.L.R. 1-221 (1983). Claimant's height was most frequently recorded as 71", which I used in evaluating the studies.

The results of the newly submitted pulmonary function studies are as follows:

DATE	EX. NO.	PHYSICIAN	AGE	FEV_1	FVC	EFFORT	QUALIFIES
08-20-04	DX 9	Hawkins	81	3.00	4.47	good	No
11-30-04	EX 1	Goldstein	81	3.26	4.18	good	No
09-30-05	CX 5	Vines	82	1.63	3.74	good	Yes

The September 30, 2005 pulmonary function study meets the regulatory guidelines as set forth in Appendix B. However, as noted above, Dr. Goldstein stated on review of this study that the values were not valid since the curves were not smooth on the flow volume loops. The record contains no contradictory evidence with respect to this opinion, and I therefore accord it substantial weight.

The results of the two newly submitted valid pulmonary function studies do not meet the qualifying values set forth in Appendix B. I accord greater weight to these valid results. I find, therefore, that persuasive weight of the newly submitted pulmonary function test results are non-qualifying under the regulations. Accordingly, Claimant has not demonstrated total disability by pulmonary function study evidence.

b. Arterial blood gas evidence

The results from the one newly submitted arterial blood gas study are as follows:

DATE	EX. NO.	PHYSICIAN	pCO_2	pO_2	QUALIFIES
08/20/04	DX 9	Hawkins	39	87	No
			33*	95*	No
11/30/04	EX 1	Goldstein	35	68	No
			31*	94*	No

* after exercise study

The two new studies did not produce qualifying values, either at rest or after exercise. Accordingly Claimant has not established total disability by arterial blood gas study evidence.

c. Cor pulmonale

Under section 718.204(b)(2)(iii), total disability can be established where the miner has pneumoconiosis and the medical evidence shows that he suffers from cor pulmonale with right-sided congestive heart failure. There is no current record evidence of cor pulmonale with right-sided congestive heart failure. Therefore, Claimant has failed to establish total disability under 20 C.F.R. section 718.204(b)(2)(iii).

d. Medical opinion evidence

Total disability may also be established by the reasoned medical judgment of a physician that Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable and gainful work. Such an opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. section 718.204(b)(3)(iv).

Dr. Hawkins concluded Claimant's pneumoconiosis had caused a mild to moderate respiratory impairment and Claimant could not do manual labor. Dr. Hawkins also concluded Claimant should avoid further exposure to chemical, dust and fumes. Dr. Hawkins did not, however, discuss this opinion in light of Claimant's non-qualifying results on the pulmonary testing he conducted. Dr. Goldstein, relying upon the objective laboratory results which were non-qualifying, concluded Claimant was not disabled by pneumoconiosis, if pneumoconiosis was present. Similarly, Dr. Rosenberg and Dr. Vuskovich both discussed the results of the pulmonary function study and blood gas study tests in some detail and explained why these results support a finding that Claimant does not have a pulmonary disability. Dr. Rosenberg noted the medical literature establishes that the normal gas exchange on exercise is the best indicia of the "intactness" of Claimant's lungs and interstitium.

I find Dr. Goldstein and Dr. Rosenberg's opinions are better supported and better reasoned than the contrary report of Dr. Hawkins since they are well supported by the non-qualifying pulmonary tests of record. These reports are also supported by Dr. Vuskovich's analysis of the pulmonary test results. Finally, these reports consider more completely the pulmonary test evidence, while Dr. Hawkins considered only the results of the August, 2004 tests. For all these reasons, I find the reports of Drs. Goldstein and Rosenberg outweigh the contrary conclusions of Dr. Hawkins on the issue of Claimant's pulmonary capacity. Thus, I find Claimant has not established total disability under 20 C.F.R. § 718.204(b)(2)(iv).

Considering all the medical evidence together including the non-qualifying pulmonary function studies, the non-qualifying blood gas studies and the more persuasive well-reasoned and well supported medical opinion reports of Drs. Goldstein and Rosenberg, I find that Claimant has not established that he is totally disabled.

4. Total disability due to pneumoconiosis

Claimant bears the burden of proving that pneumoconiosis is a substantial contributor to his total respiratory disability. § 718.204(c)(1). Sections 718.204(c)(1)(i) and (ii) provide that pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

§ 718.204(c)(1)(i), (ii). Disability due to pneumoconiosis may be established by a documented and reasoned medical report. § 718.204(c)(2). The evidence does not establish that Claimant is totally disabled, nor does it establish total disability due to pneumoconiosis.

III. CONCLUSION

Based on my review of the evidence, I find that Claimant has not established any of the applicable conditions of entitlement since the denial of his previous claim. Therefore, this claim shall be denied on the basis of the prior denial pursuant to Section 725.309(d). In addition, since I find upon consideration of all the evidence of record that Claimant has failed to establish the presence of pneumoconiosis that arose out of coal mine employment or that he is totally disabled due to pneumoconiosis, I also find Claimant is not entitled to benefits under the Act.

ATTORNEY'S FEE

The award of an attorney's fee is permitted only in cases in which the Claimant is found to be entitled to benefits under the Act. Since benefits are not awarded in this claim, the Act prohibits the charging of any fee to Claimant for representation services rendered in pursuit of his claim.

ORDER

The claim of JAMES H. CALVERT for benefits under the Act is hereby DENIED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).